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IN THE

# Supreme Court of the United States

October Term, 1966.

## No. 731

LOCAL UNION NO. 542-A, -B, -C, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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*v.*

NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Local Union No. 542-A, -B, -C, International Union of Operating Engineers, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on June 2, 1966.

## OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board, printed in the Joint Appendix (p. 1a) for use of the Court below, nine copies of which are filed herewith, is reported at 152 NLRB No. 54 (1965). The opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix B hereto, is reported at — F. 2d —. The Decree of said Court of Appeals is printed as Appendix C hereto.

## JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on June 2, 1966 (Appendix C). On August 12, 1966, Mr. Justice William J. Brennan, Jr., entered an order extending time for filing a petition for writ of certiorari herein, to and including October 30, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

## QUESTIONS PRESENTED.

1. After an employer has been in collective bargaining relation with a union (petitioner herein), upon expiration of the written contract, can the employer ignore the bargaining relationship that has existed, refuse to bargain in good faith with the said union, and turn to another union as and when he pleases and thus insulate himself from this relationship?

2. Under the above circumstances, in the construction industry, where the union which had been in bargaining relation then pickets at the employer's office and job site, to truthfully advise the public of employer's refusal to hire members of said union and of employer's conspiracy with another union, peacefully and without substantial obstruction of employer's operations, is not such picketing a proper exercise of free speech and a protected activity?

## STATUTES INVOLVED.

The statutory provisions involved are National Labor Relations Act, Sections 8(a)(1), (2), (3) and (5); 8(b)(7)(C); and 8(d) (29 U. S. C. A. 158(a)(1), (2), (3) and (5), 158(b)(7)(C), 158(d)); and Sherman Anti-Trust Act, 15 U. S. C. A. 1, et seq.

## STATEMENT OF THE CASE.

Petitioner union has been held guilty of picketing more than 30 days to force the employer to recognize and bargain with it, in violation of Section 8(b)(7)(C) of the National Labor Relations Act, 29 U. S. C. A. 158(b)(7)(C). It is petitioner's position that, because of a pre-existing collective bargaining relation between itself and the employer, a bargaining and recognition relation already existed, so that the union's picketing could *not* be recognitional, but was purely truthful informational picketing. Further, it is petitioner's position that the "contract" made between the employer and District 50, United Mine Workers, is the result of an illegal conspiracy to defraud petitioner of its bargaining rights, and is therefore void.

The factual background is complex because it involves the history of the employer's relationship with respondent, and with District 50, as well as the immediate facts concerning the picketing. On April 10, 1962, Kaminski, under the name of Kaminski Construction Co., entered into a collective bargaining agreement with respondent, Local 542, effective from January 1, 1962 to December 31, 1963, and covering highway work performed in the eastern half of Pennsylvania, including the area involved herein. Said contract provided that it "shall continue from year to year unless notice to terminate or to effect a change . . . is given in writing ninety (90) days prior to expiration" (87a, 89a-90a, 20a).

On September 12, 1963, respondent sent a letter to Kaminski Construction Co. that it desires to meet with Kaminski to discuss revision of the agreement (95a-96a; 21a, 49a-50a). Kaminski never responded to this letter, nor to numerous telephone calls and other continuous attempts by representatives of Local 542 to communicate and negotiate (50a-51a, 54a-55a). Instead, without notice, Kamin-

ski "signed up" with District 50, U. M. W., under the very doubtful circumstances hereinafter described.

Kaminski bid on the Monroe County highway job in question on January 24, 1964, under the name of Kaminski Brothers, Inc. (25a) and it was awarded to Kaminski. Two days after the award, on January 26, 1964, Kaminski was approached by Alfred Cherney, a representative of District 50, United Mine Workers (28a-29a, 44a, 58a), and on February 19, 1964, Kaminski Brothers, Inc. signed a paper designated as an Authorization to an organization styled "Pennsylvania Heavy and Highway Contractors Bargaining Committee", supposedly an employers' group, to represent Kaminski and conclude contracts on Kaminski's behalf "now and in the future, with District 50, United Mine Workers".[1] It purported to authorize "any currently designated officers and counsel for such Committee" to bargain for Kaminski "in concluding a labor agreement, amendments thereto or renewals thereof with District 50, United Mine Workers" (85a-86a).

A number of peculiar facts about this transaction between Kaminski and District 50 are most significant: 1. The "Authorization", supposedly to an *employers'* group, was brought to Kaminski by a District 50 representative, who carried these documents around with him (78a-79a). 2. Kaminski never discussed this authorization with any representative of this so-called "Committee" (79a-81a), and signed the Authorization to the "Contractors' Bargaining Committee" without knowing anything about the "Committee" (43a), and without even reading it or understanding the provisions of the Authorization or the collective bargaining agreement that was involved in the transaction (45a). 3. Kaminski admitted knowing nothing at all about the so-called "Committee", or its operations, its set-up, its

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1. Mr. Kaminski's testimony actually was that he "signed a contract with District 50" (28a-29a). But, it finally appeared that, at the request of one Mr. Cherney, a representative *of District 50, U. M. W.*, he signed this "Authorization."

officers or its address; he didn't even know whether it had a constitution or by-laws (61a-62a). 4. Even as a member of this "Bargaining Committee" he never heard of its bargaining, its negotiating, or its handling disputes. 5. He never attended meetings and was advised of none, he knew of no duties it performed, and did nothing with, for or concerning the "Committee" except to authorize it and pay $300.00 dues for the year (46a-47a).

The picketing started when it became obvious that the employer was definitely going to ignore his erstwhile bargaining relationship with petitioner union and had "signed" with District 50 (31a). The picket signs announced that Kaminski was "unfair" and that it refused to renew its contract with petitioner and signed with District 50 "to break engineers' picket line", and that the employer and District 50 are working together "against the trade union movement" (34a, 37a).

The picketing was admittedly peaceful and wholly without incident, and operations of the company continued as theretofore. The employer had taken written notes of all "incidents", and, stating every fact they could muster, the employers' testimony showed that during the period of 53 days, on only eight isolated occasions, trucks would not cross the pickets (37a-38a, 62a-64a, 65a-66a, 83a, 67a). Work admittedly proceeded as usual (70a-71a). It was *admitted* by the employer that the pickets walked on only one of two roads leading into the premises and *most* trucks either *ignored the pickets or used the unpicketed road,* with no problem whatever (38a-40a).

Kaminski Brothers, Inc. has always been in the *coal mining business,* employing members of District 1, United Mine Workers (23a). Kaminski Construction Co. was organized to do *highway construction,* and, in 1962 and 1963, employed, in this work, members of petitioner union, under agreement with it (21a, 23a, 47a-49a). When the highway job here involved came up, Kaminski bid on it

under Kaminski *Brothers,* and this was the first venture out of mining under this name (24a-25a, 27a).[2]

In any event, the companies are one and the same, although separately incorporated. The only difference has been that Kaminski Construction Co. has done highway work and Kaminski Brothers has, heretofore, done only mining work. Both companies have the same officers, shareholders and equipment. Both are under the same control (20a, 59a-60a). There has been no change in the make-up of Kaminski Construction Co. since it was organized and Mr. Kaminski admits that it still exists and he intends to use it in the future to perform the same work as heretofore (50a). In November, 1963, Kaminski Construction Co. wrote on its Employer's Monthly Report to Operating Engineer Pension and Welfare Funds that it "is not active with the Engineers at the present time" (51a, 53a). But, the Company never said that it did not intend to hire any more engineers (51a).

Despite the collective bargaining relation with petitioner, the Board excused the employer's refusal to bargain in good faith with petitioner, and condemned petitioner's peaceful and non-obstructive picketing as "recognitional" and illegal. This clearly violates petitioner's right of free expression and right to truthfuly publicize the employer's unfair practice. Further, the Board's action ignores and puts to nought the important collective bargaining relation that exists between petitioner and employer and survives the written contract. It ignores the employer's duty to continue to bargain in good faith with petitioner, and the employer's conspiracy with District 50 to evade its obligation to petitioner. This Court is here requested to review the approval of this decision by the Court of Appeals.

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2. Mr. Kaminski said he used "Brothers" to bid on this job because it was "older", "bigger" and "had most of the equipment" (26a). But, in the past the *Construction* Co. used this same equipment to perform construction work (20a).

## REASONS FOR GRANTING THE WRIT.

### I. After an Employer Has Been in Collective Bargaining Relation With a Union, He Cannot, Upon Expiration of the Contract, Suddenly Ignore That Bargaining Relation and Refuse to Bargain in Good Faith With That Union. Picketing by Such Union, Already Recognized in Law, Cannot Be "Recognitional Picketing."

The collective bargaining relation between petitioner union and Kaminski continued to exist even after the expiration of the contract. The collective bargaining agreement of January 1, 1962 contained a provision that, in absence of notice of termination, ninety days before December 31, 1963, it was automatically renewed for another year. As this date approached, the union gave notice of its desire to meet with the employer and discuss changes in the terms. Kaminski failed to do anything concerning the contract and its continuing obligation to bargain. Therefore, the agreement continued in effect and petitioner remained the bargaining representative. This was required by the provisions of the contract *and* by those of the National Labor Relations Act. That Act, in the interest of preserving industrial stability, provides, in Section 8(d) thereof, 29 U. S. C. A. 158(d), that an employer who desires to terminate or modify a collective bargaining contract must:

1. Notify the other party in writing of the desire, sixty days before the expiration date of the contract;

2. Offer to meet and confer with the union, to negotiate a new contract or modifications of a contract;

3. Notify the Federal Mediation & Conciliation Service, within thirty days of such notice, unless agreement has been reached by them;

> 4. Continue in full force and effect, all terms and conditions of the existing contract for a period of sixty days after such notice is given, or until the expiration date of the contract, whichever occurs later.

Thus, Congress has clearly intertwined termination with the duty of renegotiation. This comports with the general intention of the Congress to maintain a relationship between the parties to effect stability in industry and the protection of hard won status. The Act prohibits the party who gives no notice from terminating the agreement, and obligates him to continue under existing terms until modified.

In the context of the Act, even in case of proper notice, "termination" of an existing collective bargaining agreement does not sever the relationship as would ordinarily be the case in contracts generally. The Act requires both sides to continue to bargain even after termination of the collective bargaining agreement. For rights do not just abruptly end, nor do the relative obligations. In virtually all such agreements, provision has been made for pension plans, welfare plans, employees' security and other benefits, all of which look to the future, long after the termination date of any contract. Termination of such an agreement simply involves new negotiations generally to increase the benefits and scope of such plans. Termination of a collective bargaining agreement does not and cannot, under the existing law, mean a break-up in the relationship between the parties. This is just what the Act recognizes and implements.[3]

Under the general law of contracts, either party may terminate the contract as provided therein and such termination effectively puts an end to the relationship and to

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3. Similarly, even where employees' rights exist solely under a collective bargaining agreement, the expiration of such agreement does not cancel the employees' rights. *Zdanok v. Glidden*, 288 F. 2d 99 (2nd Cir. 1961).

any obligations thereunder. Such is not the case where a collective bargaining agreement between employer and employee in the labor-management field is involved. For a *relationship* has been created, and continuing rights and obligations persist. This is necessary to stabilize industry and protect both labor and management. Thus, labor is free to choose its own representatives, and management is under legal obligation to continue to bargain collectively with these representatives.[4] Refusal on the part of the employer constitutes an unfair labor practice and may be penalized by appropriate Board action. Labor, on the other hand, is bound to observe certain rules of conduct including proscriptions against secondary boycotts, improper picketing, and other specified activity. In short, in labor relations, the *relationship* is the cardinal consideration, and the written contract is but an expression of the terms and conditions thereof.

The Board concluded that the letter from petitioner union terminated the contract and the bargaining relation. This was clearly not the case. When the union notified Kaminski of its desire to meet and negotiate, it complied with the law. Despite Kaminski's silence and refusal to move, respondent refrained from striking. In taking no action, and ignoring the union's notice, Kaminski could not wash away a relationship between it and its employees which had built up during the period of its contractual relationship with the union.[5] It is clear that the union's letter to the employer asking for negotiations on possible changes

4. Not forever, as respondent has expressed its alarm, but sufficiently to satisfy Section 8(d) of the Act and to permit good faith negotiation. Here, nothing whatever was even attempted in this direction by the employer.

5. Employers are not free to abandon their employees. An employer may be pursued even when it seeks to escape from its employees by moving to another area. Such "runaway shop", improperly motivated, may be required to continue its relationship and to bargain in good faith. *NLRB v. Winchester Electronics, Inc.*, 295 F. 2d 288, 291-92 (2nd Cir. 1961).

in the contract did not terminate the relationship between the respondent and the employer, nor did it relieve the employer of its responsibility to respond. *Communications Workers, Mountain States Div. No. 17 v. Mountain States T & T Co.*, 81 F. Supp. 397 (D. Colo. 1948). In *Kenai Salmon Packing Co.*, 144 NLRB No. 105 (1963), the Board emphasized that where a contract has, as here, an automatic renewal provision, where request is made for discussion of additional terms, or a change of existing terms, such request is *not* tantamount to notice of termination, and it does *not* relieve the employer of his duty to bargain in good faith.

The letter and the events that followed are compatible only with extension of the bargaining relation. This was the usual way to *formalize* the extension of the already-existing relation with the modifications. There was no indication of a desire to terminate relations.[6]

Kaminski could not escape its employees by ignoring the union's letter and the offer to meet. Nor is it any defense to say that Kaminski had no steady pool of employees in the past. The construction industry is such that all employment is casually dependent upon the fortunes of particular employers in obtaining contracts in this field. There has, accordingly, built up a reservoir of men, experienced, skilled and devoted to the industry who are readily available for employment by all of the contractors. All of the contractors draw from this pool as they require employees and return the men to the pool when the need ceases. The fact that an employer, for his own benefit, may see fit not to draw from this pool does not make him any less an employer, nor detract from this relational obligation. At the very least, those employees in the pool who have actually

6. In *Fibreboard Paper Products Corp.*, 130 NLRB 1558 (1961), the Board made it clear that for a letter to make the automatic renewal inoperative, it must demand specific changes in the agreement and these must be *substantial*. But, in the instant case, the union's notice was merely an expression of a desire to negotiate. There was no demand for *substantial change*.

worked for Kaminski, must be qualified and eligible as employees of Kaminski.

It is against this background that the Act and the collective bargaining agreements must be interpreted. Although the original term expired, the relationship continued —especially in view of the offer by respondent to negotiate. There was a continuing obligation on the part of Kaminski to bargain in good faith. Its failure to do so constitutes an unfair labor practice, but the contractual obligation remains, nevertheless.[7]

There was, therefore, no need on the part of petitioner to obtain or "coerce" recognition from Kaminski. This was a legal fact. Further, there was no indication of any effort to approach Kaminski employees to join the union. Under all circumstances, respondent's picketing could not have an object of forcing or requiring Kaminski to recognize or bargain with it as the representative of its employees. Indeed, all presumptions concerning this form of expression must weigh in favor of its legality.

It has been many times reconfirmed that *any* limitation upon the right to picket must be narrowly and strictly applied—that the right to peaceful picketing, as here, is the *rule*, and may be denied only by specific, reasonable and necessary prohibition. In *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U. S. 58, 12 L. Ed. 2d 129 (1964), the Court held (L. Ed. at 133):

> ". . . Throughout the history of federal regulation of labor relations, Congress has consistently re-

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7. It must be noted that Kaminski Construction Co. and Kaminski Bros., Inc. are one and the same company. They have common principals, officers, offices, shareholders and control. Both use the same equipment. Thus, the law will treat both as one entity. *Rumig v. Ripley Manufacturing Corp.*, 366 Pa. 343, 346 (1951); *McCarthy v. Ference*, 358 Pa. 485 (1948); *Sakrete of No. California, Inc. v. NLRB*, 332 F. 2d 902 (9th Cir. 1964). Any collective bargaining agreement made in the name of one Kaminski company is binding on the other.

> fused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . We have recognized this congressional practice and have not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' . . . that Congress intended to do so as regards the particular ends of the picketing under review. *Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.*" (Emphasis supplied.)

In that case, where this Court was concerned with secondary picketing, Mr. Justice Brennan, speaking for the majority, emphasized that "narrow focus" which must be assumed when considering the proscription of peaceful picketing (L. Ed. at 134). It was emphasized that the right to picket, as an exercise of free expression, is the rule, and proscription thereof the narrow exception (L. Ed. at 137-138). The Court, although specifically recognizing that even peaceful picketing may, and often does, have collateral and incidental effects, confirmed the guarantee of such activity unless a reason to proscribe it appears in the clearest manner.

Here, the evidence shows only a request by a union already in bargaining relationship that the employer, in good faith, discuss some changes in terms. This does not dismiss the relationship that exists, or turn the union's request into a demand for recognition. The employer's failure to comply with its obligation does not render the union's proper request improper—it merely demonstrates the employer's lack of good faith. To hold the union's action as a violation of Section 8(b)(7)(C) deprives petitioner of its freedom of expression, as guaranteed by the Constitution and Section 7 of the Labor Act.

**II. The Conspiracy Between the Employer and the Charging Party Union Herein, Whereunder the Employer Turned to Said Union, in an Effort to Evade Its Obligation to Petitioner Union, Violates the Anti-Trust Laws and Is a Flagrant Unfair Labor Practice; Thus, the "Contract" Between Them Is Void.**

The most shocking aspect of this entire episode is the obvious scheme worked out between Kaminski and District 50 in an attempt to give the former its "out" from the duty to bargain with Local 542.

The undenied facts present proof positive of the conspiracy. It is obvious that the "Contractors' Bargaining Committee" is a fiction, and is a creature of District 50—a means of using a single sheet of paper to simulate agreement to a "contract". That Kaminski knew he was not dealing at arm's length with District 50 and that whatever he did would not really affect him is clear from the way he entered into the deal with Cherney. When Kaminski had signed the 1962 collective bargaining agreement with Local 542, he closely examined it, consulted his attorney about it, and asked him to explain it, just as any sensible businessman would in any proper arm's-length business dealing. In contrast, when he signed the Authorization as Kaminski Brothers, Inc. to the "Contractors' Bargaining Committee" he did so precipitously, without knowing anything about the "Committee", its policies, nor even its members; he did not even inquire about the terms that would be in the "Collective Bargaining Agreement" that he was blindly binding himself to. His attitude and method of dealing with District 50 demands the conclusion that he did not care what he signed, since it would not really affect him anyway.

The strange brotherhood and permanent connection between the "Contractors' Bargaining Committee" and District 50 was so obvious and suspect that Judge Nealon

was moved to probe into the set-up.[8] Mr. Kaminski had testified that Mr. Cherney, of District 50, and no one else, approached him and had him sign—not a contract with District 50, but an indenture to the "Contractors' Bargaining Committee" which, in turn, bound Kaminski blindly to any deal that the "Committee" might make with one specified organization—District 50. Indeed, Mr. Cherney, in testifying, wholly intermingled the "Committee" with District 50, making obvious their single identity (77a-78a). The District 50 agent frankly admitted this method of operation: When District 50 hears of a job opening up, he contacts the contractor. But, he does *not* ask the latter to sign a collective bargaining agreement with District 50. Instead, he asks him to join the contractors' association and to sign the Authorization to the "Contractors' Bargaining Committee". He, the representative of District 50, carries with him to the contractor a supply of these employers' Committee Authorizations (79a) in an effort to recruit new members for the Committee. Further, he, a purported "union" representative asks the employer to designate the "Contractors' Bargaining Committee" as his agent to make a contract to which the employer will adhere, no matter what it may provide (79a-80a). No one from the phantom "Contractors' Association" ever appears (81a, 82a-83a).

Thus, we have a so-called "union" whose representative goes out among employers and solicits members for a mysterious "Contractors' Bargaining Committee", which, apparently, is supposed to "bargain" on behalf of employers with the very "union" whose representative is soliciting *for the "Committee"*. Further, thereupon, the employer blindly signs an Authorization for this unknown, unlocated and uninvestigated "Committee" to bind him indefinitely in the future to any contract with District 50 that the "Committee" (which *is* District 50) chooses to print.

8. This matter was presented to the Trial Examiner upon the record in the related injunction proceeding in the Middle District of Pennsylvania, Civil Action 8460.

It is clear as crystal that the employer, a hard-headed businessman where Local 542 is concerned, was not worried about District 50, because he was assured of "favorable treatment" by District 50, and of a means whereby he could get rid of Local 542. This is the classic example of a combination or conspiracy between businessman and a "union" to eliminate an obligation on one hand and competition on the other. This was in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act, 15 USCA 1, et seq.; *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 809-10, 89 L. ed. 1939, 1948 (1945). This restraint of competition by the "union", in order to monopolize the labor market in the area need not be demonstrated by direct evidence of the conspiracy. For, "it is recognized that conspiracies are seldom capable of proof by direct testimony, and it is settled that they may be inferred from the acts of the parties thereto". Thus, purely circumstantial evidence is sufficient proof of such conspiracy. *Pennington v. United Mine Workers of America* (6 Cir., 1963), 325 F. 2d 804, 811.

By this conspiracy, the employer has interfered with the employees' rights and illegally forced District 50 upon them, refusing to bargain with petitioner union, in violation of Sections 8(a)(1), (2), (3) and (5) and 8(d) of the Act. It was a further violation of Sections 8(a)(1), (2) and (5) for Kaminski to make his deal with District 50. *NLRB v. Marcus Trucking Co.*, (2 Cir., 1961) 286 F. 2d 583, 593.

Even if the Local 542 contract were out of the picture, and Local 542 were merely attempting to be recognized for the first time, the action of Kaminski would be illegal. In recognizing District 50 while a rival union was also claiming recognition, so that a "real" question of representation existed, Kaminski violated Sections 8(a)(1) and (2), in rendering unlawful assistance to District 50. *Tri-W Construction Co.*, 139 NLRB 1286, 1291 (1962). Therefore, the "agreement" between Kaminski and District 50 should be abrogated, and the Local 542 contract reinstated. The

violations of the Sherman Act and the National Labor Relations Act which were the foundation of the connection between Kaminski and District 50 wholly taint and destroy all validity and effect to any "contract" that may have arisen therefrom.

The refusal of the employer to recognize its continuing relation with petitioner is a distinct violation of the spirit as well as the letter of the Labor Act. The active conspiracy with another organization aggravates the gravamen of the entire situation and demonstrates the illegality of the employer's entire dealing herein. This situation, being duplicated many times in this area alone, violates the employees' basic rights under Section 7 of the Labor Act, and must be examined by this Court, and the Decree below reversed.

**III. Picketing to Truthfully Advise the Public of an Employer's Refusal to Honor a Continuing Bargaining Relationship and of His Conspiracy With Another Union to Evade His Obligation to Bargain, Such Picketing Being Peaceful and Without Substantial Obstruction of Employer's Operations, Is a Proper Exercise of Free Speech and a Protected Activity.**

Sec. 8(b)(7)(C) of the Act has two well-defined attributes which the Board and the Court below have wholly ignored or misconstrued. First, the section contains a specific exception to its effectiveness: if the picketing at issue, although having the object of recognition, does nevertheless truthfully advise the public and does not induce another to refuse to handle goods or perform services, the activity is excluded from the prohibition of the section.

Second, in applying this exception to Section 8(b)(7)(C), the courts have necessarily made a distinction between immediate and ultimate objectives, and have made it clear that only picketing which has recognition as its immediate objective is prohibited. Further, the courts have required substantial independent evidence to warrant

the conclusion that an object of picketing was recognitional. *Penello v. Retail Store Employees Local 692,* (D. Md. 1960) 188 F. Supp. 192, 201. While, in applying Section 8(b)(7)(C) to determine the basic legality of the activity, the existence of one illegal (recognitional) objective may be sufficient to sustain the charge, despite the fact that it was surrounded by many legitimate objects, in considering the statutory exception to this section, the Court need only ascertain whether, although the ultimate objective is recognition, the immediate purpose is to truthfully advise the public that the employer does not employ members of the union.

It has already been pointed out that the picketing herein could not have had a "recognitional" objective, since the employer was already bound in recognition. The only reason could be an effort to publicize the employer's refusal to bargain in good faith. But, even if the ultimate object were "recognitional", the *immediate* purpose of petitioner's activity was clearly to advise the public of the fact that Kaminski did not employ petitioner's members and that Kaminski and District 50 had conspired to defeat petitioner's rights and its members' work opportunities. So long as the information publicized was truthful, it was protected. The truthfulness of the signs is clear, from the record.

The discussion of Judge Skelly Wright in *Lebus v. Building and Construction Trades Council,* (E. D. La. 1961) 199 F. Supp. 628, is most enlightening. There, refusing an injunction for alleged violation of 8(b)(7)(C), he held that the informational picketing proviso of subsection (C) qualifies the whole preceding part, so that picketing which may be deemed recognitional becomes proper and protected if it is also informational (632). Indeed, the proviso is not even invoked unless an object of the picketing is for recognition. The Court said (at 632-633):

> ". . . If picketing is neither organizational nor recognitional, it does not violate the section. As to such

> picketing, the second proviso serves no purpose. Its usefulness is limited to permitting certain picketing otherwise condemned in Sec. 8(b)(7)(C). . . .
>
> * * *
>
> ". . . Suffice it to say that the clear intent of Sec. 8(b)(7)(C) is to exclude from the prohibition of the Act picketing which, while embracing the proscribed object of recognition or organization, nevertheless meets the condition, first, of truthfully advising the public . . . and, second, of not inducing any individual employed by another not to pick up, deliver or transport goods or perform services."

Judge Wright then stated that, while there were some isolated instances of refusal to cross picket lines, they did not substantially affect the progress of the work, observing, at 633:

> ". . . If there were any real intention on the part of the Union to stop deliveries, undoubtedly there would be more respect for the picket line."

In view of the limited amount of coercive effect, the Court properly felt that "it must be assumed that the primary purpose of the picketing was information and thus protected by the Act" (634).

The picketing in the instant case falls wholly within Judge Wright's discussion in *Lebus*. It was calm and peaceful and did not prevent the ingress and egress of anyone to and from the sites involved. Had a desire existed to prevent dealing with Kaminski, Local 542 could easily have given effect to it. But, instead, trucks, material and workers continued to go through to work and to deal with the company. Kaminski admits that the union left wholly free of pickets one of the means of access to Kaminski's office and quarry, and that trucks regularly used this latter road to enter the premises. No effort was made to

convince, prohibit or coerce. The isolated instances that existed did not substantially affect the employer's work. The fact that several truckers did not cross the picket line merely reflected their approval of the informational objective. See *Local 107, Intl. Hod Carriers,* 138 NLRB 102, 104 (1962). So long as the picketing truthfully advised the public, even if isolated instances of interferences in service may have existed, Section 8(b)(7)(C) was not violated. *Retail Clerks Local 324,* 138 NLRB 478, 479 (1962).

The orders of the Board and the Court below fail to give the effect intended by Congress to the clear exception to Section 8(b)(7)(C). This provision is more than an exception to a statutory prohibition; it is a required recognition of the workers' Constitutional right to freedom of expression[9] and their statutory "right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection", as provided in Section 7 of the Labor Act.

This Court is earnestly requested to review the denial to the workers here involved of these rights which are the very basis of the entire labor legislation.

## CONCLUSION.

This Court is requested to review this matter in order to inform the public, labor and management whether upon expiration of a collective bargaining agreement, the relationship between the union and the employer suddenly stops, or whether the employer is bound to negotiate in good faith with the union. This Court is asked to interpret and apply Section 8(d) of the Act, which clearly stipulates a continuing bargaining relation, and, yet, has been otherwise applied by the Board and the Court below. Can the expressed Congressional desire for stability in labor-management relations really be served if management may,

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9. *NLRB v. Fruit & Vegetable Packers and Warehousemen, Local 760,* 377 U. S. 58, 12 L. Ed. 2d 129, 133, 137-138 (1964).

with impunity, refuse to negotiate at the end of a contract term, despite the *relationship* that has been created. Can the obligations flowing from this relationship be evaded by seizing upon a new and hollow "union" as insulation therefrom? May an employer in this enlightened day and age frustrate the collective desires of his employees by forcing upon them an unwanted "collective bargaining representative"?

It is respectfully submitted that the issues herein, of the greatest importance in the labor relations field, must be considered and resolved by this Court, in order to prevent a perpetuation of the decisions below.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LORRY,
*Counsel for Petitioner.*

## APPENDIX A.

### National Labor Relations Act (29 USCA)

* * *

**§ 158. Unfair labor practices**

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the repre-

sentative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining rep-

resentative, unless such labor organization is currently certified as the representative of such employees:

* * *

(C) where such picketing has been conducted without a petiton under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions

of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the disputes occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification

of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

## Anti-Trust Act (15 USCA).

### § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for

such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

## APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15660

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

*v.*

LOCAL UNION NO. 542-A, -B, -C, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued April 21, 1966

Before KALODNER, HASTIE and SMITH, *Circuit Judges*

**Opinion of the Court**

(Filed May 9, 1966)

PER CURIAM:

This is a proceeding to enforce an unfair labor practice order. On the disputed issues in this case the court is satisfied that the record adequately supports the Board's finding that an objection of the picketing in controversy was to compel the employer to recognize or bargain with a labor organization and the Board's additional finding that the picketing was not for the purpose of truthfully advising the public that this was not a unionized operation.

An appropriate decree will be entered enforcing the order of the Board.

## APPENDIX C.

### Decree

Before: Kalodner, Hastie and Smith, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on May 12, 1965. The Court heard argument of respective counsel on April 21, 1966, and has considered the briefs and transcript of record filed in this cause. On May 9, 1966, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Local Union No. 542-A, -B, -C, International Union of Operating Engineers, AFL-CIO, its officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

By THE COURT:

KALODNER, *Circuit Judge.*

DATED: June 2, 1966.